United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 18,950

PHILLIP L. PELLETIER,

Appellant

9331

v

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

(1) On a pre-sentence motion to withdraw a guilty plea assertedly induced by mental anxiety created by physical illness at trial, did the trial Court deny the defendant a fair hearing on the motion

a) in ignoring at the form of hearing on the motion the ultimate material issue of defendant's mental state at the time the guilty plea was entered, when there remained unresolved by the Court the previously raised issues of the defendant's competence and sanity;

b) in making an adverse pre-judgment of the motion, prior to the hearing thereon?

(2) Did the trial Court abuse its discretion by denying a defendant's pre-sentence motion to withdraw a plea of guilty to a single count of the indictment, where the evidence adduced at the form of hearing on the motion raised a substantial question whether the plea was voluntary, and a grant of the motion would have resulted in a trial of defendant on the full indictment?

(3) Did the trial Court's refusal, following denial of a fair hearing. to permit pre-sentence withdrawal of a defendant's involuntary plea of guilty deny the rights guaranteed by the 5th and 6th Amendments?

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MISCELLANEOUS

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JURISDICTIONAL STATEMENT

Appellant was charged in a 17-count indictment filed in the District Court on May 18, 1964 (Cr. No. 434-64) with violation of 18 USC §371 (conspiracy); 18 USC §2312 (Interstate Transportation of Stolen Motor Vehicle); 18 USC §2314 (Interstate Transportation of Forged Checks); 22 D.C. Code §1301 (False Pretenses) and 22 D.C. Code 1401 (Forging and Uttering) (R. Indictment). Jurisdiction was conferred on the District Court by 18 USC §§3231, 3237; 11 D.C. Code §521; Rule 18 F.R. Cr. Proc. Appellant pled "Not Guilty" to all

counts on May 22, 1964 (R. Plea of Defendant), and went to jury trial on the indictment on June 25, 1964 (Trial Tr. 1, et seq.) without prior judicial disposition, following mental observation, of the previously raised issues of his sanity and competence to stand trial. On the second day of trial, Appellant changed his plea to the first count of the indictment only (conspiracy) to "Guilty", with the understanding that the remaining counts would be dismissed at the time of sentencing (Trial Tr. 58-60).

Thereafter, on July 10, 1964, prior to sentencing on count I, and prior to dismissal of the remaining 16 counts of the indictment, Appellant filed, pro se, a motion under Rule 32(d), Federal Rules of Criminal Procedure, to "Withdraw Plea of Guilty." Appellant there alleged that he was physically ill at the time trial commenced and that, because of "extreme anxiety for his health" in light of the anticipated two-week length of trial plus the "expressed [desire of] the trial judge for a disposition of this case due to the anticipated length of trial, plus the numerous witnesses from other districts, the defendant's physical and mental condition compelled him to enter a plea of guilty." The motion alleged, moreover, that Appellant had, on

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1/ "Tr." references are to the transcript of trial held June 25 and 26, 1964, and later hearing.

February 13, 1964, prior to his indictment in No. 434-64, been committed [2] to St. Elizabeth's Hospital for mental observation and had there been diagnosed by a majority of the examining psychiatrists as "Anxiety Reaction - Obsessive-Complusive" (Defendant's Motion filed July 10, 1964).

The trial Court held a form of hearing on Appellant's motion on July 24, 1964, at which medical testimony confirmed the fact of Appellant's physical illness at trial.

The hearing was entirely devoid of any psychiatric evidence respecting either the probable psychological effect upon Appellant of his illness at trial, or the obviously related issues arising from the fact of Appellant's prior commitment to St. Elizabeth's for observation. The sole evidence relating to the issue of Appellant's mental state was Appellant's own testimony affirming the substance of his written motion (Tr. July 24, 1964, pp. 1-31).

The trial judge, at the close of the form of hearing, denied Appellant's motion and remanded Appellant to the District Jail; forthwith sentenced Appellant to imprisonment for a period of 16 to 48 months and the remaining counts of the indictment were thereupon dismissed (Tr. July 24, 1964, p. 31; Orders of July 24, 1964 Judgment and Commitment, July 24, 1964).

2/ For the bases for that commitment, see "Statement of the Case", pp. 4-11, infra.

Appellant's July 28, 1964 application to the District Court to proceed in forma pauperis, pursuant to 28 USC §1915, was denied by the trial judge (Affidavit in Support of Application, filed July 28, 1964). Appellant's timely application to this Court, filed pursuant to Rules 41(a)-(c) of this Court's Rules, was granted by per curiam Order filed September 10, 1964. This Court's jurisdiction is conferred by 28 USC §§1291, 1294, 1915.

STATEMENT OF THE CASE

The Order entered by the District Court in its Criminal Docket No. 434-64 denied leave to withdraw Appellant's plea of guilty to count I of the 17 count indictment first filed in that docket on May 18, 1964 (Indictment). Appellant was arrested for the alleged acts ultimately recited in that indictment on October 17, 1963. He had been continuously in the District of Columbia Jail from that date to the date of trial, over seven months, with the exception of some 90 days in St. Elizabeth's Hospital for mental observation.[3/] Ultimately, on December 23, 1963, an indictment was filed in the District Court's Criminal Docket No. 1228-63, charging Appellant in 14 counts with forging and uttering, interstate

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3/ The United States Commissioner, on preliminary hearing on October 18, 1963, noted, on his order of commitment, "Defendant states he is in need of medical attention."

transportation of forged checks, and of a stolen motor vehicle (18 USC §§2312, 2314; 22 D.C. Code §1401) but without the conspiracy count included in the later indictment in Cr. No. 434-64. 4/

Appellant entered his plea of "Not Guilty" to all counts of the indictment in No. 1228-63 on January 2, 1964, and the District Court thereafter denied an earlier filed motion of Appellant's appointed attorney to dismiss for delay in filing the indictment and granted a motion for mental examination. Appellant entered St. Elizabeth's on February 13, 1964, and on May 6, 1964 the then Acting Superintendent of St. Elizabeth's addressed a letter to the Clerk of the Criminal Division of the District Court advising that, after examination and observation by "qualified psychiatrists" it was their opinion that Appellant "is mentally competent for trial [and] that he is not now, and was not, during the period [when the crimes described in the indictment were allegedly committed] suffering from a mental disease or defect."

4/ The record in No. 1228-63 in the District Court is not included in the record on appeal here. However, in the course of briefing this appeal it has become increasingly apparent to Court-appointed counsel for Appellant that the events in that District Court docket are an integral part of the background of this appeal as suggested by the text of this Statement of the Case. It does not appear that there will be any disagreement between the parties with respect to the contents of that docket as recited herein, and counsel for Appellant has concluded that further delay in briefing this appeal is not warranted. However, Appellant's counsel is preparing, and will file simultaneously with, or shortly after the filing of, this brief a motion to enlarge the record on appeal to include the file in No. 1228-63.

Therafter the new 17 count indictment first asserting violation of the conspiracy statute, was filed in Cr. No. 434-64. Appellant pled "Not Guilty" to all counts at arraignment on May 22, 1964 (Statement of Docket Entries; Plea of Defendant) and was remanded to the District Jail. The still-pending indictment in No. 1228-63 was dismissed by order of Judge McGuire, entered May 27, 1964, three weeks after submission of the above-described letter from St. Elizabeth's Hospital.

No hearing was ever held in No. 1228-63, or in No. 434-64, on the competence or sanity issues.

Appellant went to trial on the indictment in No. 434-64 on June 25, 1964, before a jury, Judge Keech presiding, after the earlier denial of a motion to suppress evidence obtained in the course of an allegedly unlawful arrest and search of his person. After the prosecution's opening statement (counsel for Appellant reserved his statement) one prosecution witness testified on that date, and one on the morning of the following day, June 26th. Following the second witness' testimony, the Court recessed at the request of Appellant. His counsel then advised the Court that Appellant would plead guilty to count I (conspiracy) and the Court was advised that the remaining counts would be dismissed at the time of sentence. The Court then accepted Appellant's plea of guilty to count I (Trial Tr. 1-60).

Fourteen days later, on July 10, 1964, and prior to sentencing, Appellant filed, pro se, a handwritten, sworn "Motion to Withdraw Plea of Guilty" under Rule 32(d), F.R. Cr. Proc. He there advised the Court, inter alia, that for several days before trial he had unsuccessfully sought medical relief at the District Jail, for "severe headache, difficulty in breathing, persistent cough, and lightheadedness," but was unsuccessful in obtaining medical advice until the late evening of June 25th, following the first trial day, when a medical assistant diagnosed his ailment as "acute asthma with severe respiratory tract infection"; and prescribed medication, including an injection in his arm. The motion further alleged that on the following day, the second trial day, his forearm was swollen and streaked with red, in addition to his previously-described symptoms; that he was then suffering from "extreme anxiety for his health and feeling he could not bear up to the" two weeks of trial which the trial judge had allegedly predicted for the jury's benefit; that he had entered a plea of guilty because of those factors, considered with the trial judge's asserted stated desire for a "disposition in the case due to the anticipated length of trial plus the numerous witnesses from other districts"; and that it was the "Opinion of a majority of the psychiatrists [who had observed him at St. Elizabeth's] that [he] be classified as: Anxiety Reaction - Obsessive - Complusive."

He expressly denied his guilt and asserted that the guilty "plea was entered under compulsion and threat that permanent injury could result from a lengthy trial, and the acute anxiety and compulsion existing in his mind at the time" (Defendant's Motion filed July 10, 1964).

The trial judge inserted initialed handwritten notes in the margins of Defendant's Motion, stating his conclusions opposite certain of the allegations of the Motion:

1) Opposite Appellant's allegation that he had been classified at St. Elizabeth's as "Anxiety Reaction-Obsessive-Compulsive" the trial judge inserted the note "See 5/6/65 Report St. Elizabeth Hosp. - Competent - <u>not</u> suffering mental disease or defect 9/17-10/17.63 RBK."

2) At page 3 of Appellant's motion, opposite the above described statements of Appellant respecting his physical illness and mental anxiety, the marginal note was inserted, and dated nine days <u>prior</u> to hearing on the motion:

> "Not so, see Transcript - Furthermore trial was in 2nd day - after key witness put finger on D - D personally asked for recess. After conference with his atty - D was fully questioned and entered P.G. Ct. 1 of 17. R.B. Keech, J. 7/15/64."

At the hearing held nine days later, on July 24, testimony was given only by a fourth year medical student assigned as a medical extern to the District Jail

(Tr. July 24, 1964, p. 3), by a staff physician at the Jail (Tr. July 24, 1964, p. 21), and by Appellant.

The staff physician testified that his records showed that he had seen Appellant for "a minute or two" at the regular sick call on the morning of June 24th, the day before trial; that "he came in and passed and said I have a cold and a cough and I said okay, we will give you some medicine," and that he then prescribed medication (Tr. July 24, 1964, pp. 21-23).

The medical extern testified that he had examined Appellant between 10 and 11 P.M. of the first day of trial (June 25); that Appellant then had a pulse of 100 and a temperature in excess of 100° F.; complained of head and chest cold; had an inflamed nose and throat. The extern diagnosed the ailment as acute asthma and bronchitis, and treated it with several types of medication. These included one drug which he injected in Appellant's forearm, as well as a second drug administered intravenously (Tr. July 24, 1964, p. 5-8, 14). The extern also administered a drug "called quadrinal" because "most of these patients have a small amount of anxiety during this and this relieves it (Tr. July 24, 1964, p. 10, 11).

This witness testified that the type of injection he administered to Appellant "generally can" cause swelling and streaking of the arm. Another extern later advised him that Appellant's arm had been swollen. The record made by

his colleague, of an examination made in the evening of June 26th, after the guilty plea was entered, was that Appellant had complained of inflammation of his arm, but that at the time of the evening examination, there was no redness or tenderness, although "two needle tracks [were]" noted (Tr. July 24, 1964, pp. 18, 19).

Appellant's testimony confirmed the medical testimony, adding details as to symptoms of his physical illness before and during the trial. He also testified that, on the evening of June 26, the second extern had examined his arm at 10:30 P.M. in the darkened cell-block by flashlight, "looked at it and stated it [swelling and streaking of the arm] was going away and don't worry about it and walked away" (Tr. July 24, 1964, pp. 23A-27). He further testified that, because of coughing, nasal congestion and sore throat on June 26, worse than that experienced on the 25th, and because of the condition of his arm on the morning of the 26th, he had become concerned about his physical condition.

The trial judge cut-off testimony in which Appellant sought to relate his condition on the morning of June 26 to experiences at St. Elizabeth's Hospital, but did permit the prosecuting attorney freely to elicit testimony from Appellant respecting prior convictions (Tr. July 24, 1964, pp. 26-28). He thereafter denied Appellant's motion, after concluding that he had observed no signs of illness in Appellant at trial.

In almost the precise terms used in his July 15 notation the trial judge concluded that Appellant had pled guilty at trial after, and presumably because, "an important witness for the government put the finger on him"; and that Appellant had entered his guilty plea "for the reason that he was guilty and for no other reason" (Tr. July 24, 1964, pp. 30, 31).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Constitution of the United States

Fifth Amendment

> "No person shall...be deprived of life, liberty or property, without due process of law...."

Sixth Amendment

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...."

Federal Rules of Criminal Procedure

Rule 11

> "A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

Rule 32(d)

> "A motion to withdraw a plea of guilty of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct

> a manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

STATEMENT OF POINTS ON APPEAL

I. The District Court erred in denying to Appellant a fair and unprejudiced hearing on the substantial issue of his mental state at the time his guilty plea was entered. [With respect to points I and II, the Appellant desires the Court to read Trial Transcript pp. 58-60 and also pp. 1-31 of the Transcript of proceedings held July 24, 1964.]

II. The District Court abused its discretion in denying Appellant leave to withdraw his guilty plea.

SUMMARY OF ARGUMENT

Appellant contended in the Court below that his guilty plea was, in effect involuntary. If that contention is valid, denial of leave to withdraw his plea has resulted in a denial of his constitutional right to jury trial, and deprivation of his liberty without due process of law.

The nature of the form of hearing below was such as to leave in serious and substantial doubt, at least, the question of the voluntary nature of that plea. The trial Court clearly construed the motion, on its face, to raise questions that, if resolved favorably to Appellant, would warrant, if

not require, a grant of leave to withdraw. In Appellant's view, a hearing was required. Whether or not required, a form of hearing was held by the Court, and since it was held, the Court had a clear duty to afford Appellant a fair and unprejudiced hearing on the issues raised; a fortiori, since the motion directly raised a question respecting Appellant's mental state at the time the guilty plea was entered. The previously raised, substantial issue of Appellant's competence to stand trial, and sanity during the period alleged in the indictment, remained undetermined. The form of hearing held was neither unprejudiced nor complete. The medical evidence was unequivocal that Appellant was physically ill during trial and apparently at the time of plea.

The earlier, pre-trial questions raised respecting Appellant's mental condition, combined with the specific allegations of the motion, imposed a duty on the trial Court beyond the mere presentations, or failure of presentation, by counsel for either party. The record nevertheless shows virtually a total absence of evidence on the basic issue of Appellant's mental condition at the time of plea; an absence which the trial Court made no effort to remedy, and which rendered the entire form of hearing meaningless. Moreover, the trial judge's pre-hearing notes indicate not only an adverse pre-judgment of Appellant's motion but a failure to make the material distinction, for purposes of the motion, between the conclusory statement of psychiatrists that he was

not suffering from a mental disease or defect, on the one hand, and on the other, the Appellant's contention that those same psychiatrist had, nevertheless, classified him as "anxiety reaction - obsessive - compulsive." The latter classification need not contradict the conclusion, if valid, that Appellant was not suffering from a mental disease or defect. But it would support Appellant's contention that he was, in fact, so disturbed at trial, by the combination of physical illness, and other factors alleged in his motion, as to establish, or establish a substantial question, that the plea was in effect involuntary.

The trial Court's flat refusal to credit the medical testimony at hearing, and to treat the fact of physical illness of Appellant when the guilty plea was entered, as alone requiring a grant of leave to withdraw, was erroneous. The error was compounded by the trial judge's earlier notes clearly indicating his intent to make an adverse disposition of the motion. These latter facts, alone, require remand with directions to vacate the sentence and judgment, grant Appellant's motion and permit him to go to trial on the multi-count indictment.

In the alternative, Appellant submits that the trial Court's action requires a remand for a full and fair hearing on the issues of Appellant's mental, as well as physical, state at the time of trial.

ARGUMENT

I. A District Court's Discretion In Disposing Of Pre-Sentence Motions Under Rule 32(d) Is Limited By The Duty Freely To Allow Withdrawal Of A Guilty Plea If Any Fair or Just Reason Appears

This, and other Federal Appellate Courts, have repeatedly held that pre-sentence motions under Rule 32(d), Fed. Rules Cr. Proc. are to be freely allowed. The pre-sentence motion, in contrast to the motion after sentence, does not require for its success, a showing that its grant would correct "manifest injustice"; Gearheart v. United States, 106 App. D.C. 270, 272, F2d 499 (1959); Poole v. United States, 102 App. D.C. 71, 250 F2d 396 (1957); and see Kercheval v. United States, 274 U.S. 220 (1927), where the Supreme Court stated that pre-sentence withdrawal of a guilty plea was to be permitted, and the defendant allowed to go to trial, "if for any reason the granting of the privilege seems fair and just" 274 U.S. 220, 224. The pre-sentence movant thus does not have the burden of showing that denial of his motion would "manifestly" be unfair or unjust, but that a grant would seem to be fair and just; that there is a reasonable possibility that denial would work an injustice.

Hence, it is not the trial Court's right or duty to usurp the jury function and make its own conclusive determination on the motion, of the guilt or innocence of the defendant, but to determine, inter alia, whether there appears to be a defense

to the charge involved which the defendant should be permitted to establish at trial; Kadwell v. United States, 315 F2d 667 (C.A. 9, 1963), at p. 670; Gearheart v. United States, Poole v. United States, supra; and see High v. United States, 110 App. D.C. 25, 288 F2d 427 (1961) at pp. 430, 431.

The rule indicated in those decisions is consistent only with the proposition that the trial Court's function, on pre-sentence motion under Rule 32(d), is to go no further than the determination (1) whether the allegations of the motion would, if true, negate the justice or legality of the prior acceptance of the guilty plea, and (2) whether any evidence taken on the issues raised by the motion establishes a reasonable possibility that the allegations may, in fact, be true.

There is, of course, implicit in the formulation of the general principle respecting pre-sentence treatment, the constitutional issue whether denial of the motion might, or would, result in deprivation of the moving defendant's liberty without due process of law, or deprive him of his constitutional right to jury trial.

II. Appellant's Motion On Its Face, Stated And Unequivocally Implied, Bases That, If Substantiated, Required A Grant of His Motion

Appellant's motion below alleged that he was physically ill at the time he entered his plea, and that that physical illness, coupled with the anticipated length of trial, had

so upset him psychologically, at the time, as to render his plea, in effect, involuntary. His alleged "Anxiety Reaction" classification tended, of course, to support his other allegations. He asserted his innocence, and implicitly sought the opportunity to go to jury trial on the full indictment.

There were clearly legal issues available to be raised. Some have, in fact, been raised, and could be preserved for appeal. This Appellant's counsel, appointed by the District Court, had, by motions, raised issues respecting suppression of evidence, and the legal validity of the indictment originally filed in Cr. Nos. 1228-63 and 434-64 (Trial Tr. pp. 19, 20). What issues of fact might have been raised, and with what results, is, of course, unclear. It is apparent, however, that some such issues, at least, did exist; see Trial Tr. pp. 37-38. It is clear also that, in No. 1228-63, Appellant's court-appointed counsel had successfully moved for a mental examination and that following observation of Appellant at St. Elizabeth's there had been no judicial determination of the issues of competence or of "mental disease or defect." 5/ The Court admittedly knew that the guilty plea was entered at the instance of Appellant,

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5/ Cf. dissenting opinions in this Court's decision in Adams v. United States, Misc. No. 2339, September 21, 1964; Hunter v. United States, No. 17780-81, October 15, 1964 (En Banc); and the majority opinion of the Court in Rollerson v. United States, No. 17675, October 1, 1964.

rather than his court-appointed attorney (Trial Tr. 58; Tr. July 24, 1964, p. 30).

The allegations of physical illness alone, and particularly coupled with the assertion that that illness, alone or in combination with other factors, produced the mental state asserted, would, if supported by evidence, clearly have established that entry of Appellant's guilty plea was, as a practical matter, involuntary; Gearheart v. United States; High v. United States; Poole v. United States, supra.

III. Appellant Was Denied A Fair Hearing By The Trial Court On The Material Issues Raised By His Motion

The issues presented by Appellant's motion below were factual and did not involve, and were resolvable apart from, the merits of the case. Their disposition required a hearing, as a matter of law, as well as of elementary justice; Zaffarano v. United States, 330 F2d 114 (C.A. 9, 1964) and 306 F2d 707 (C.A. 9, 1962); Gilinsky v. United States, 335 F2d 914 (C.A. 9, 1964); and compare Dandridge v. United States, 356 U.S. 259 (1958) reversing, per curiam, 101 App. DC 114, 247 F2d 105, and this Court's discussion of Dandridge in Gearheart v. United States, supra. The District Court did, in fact, hold a form of hearing on Appellant's motion. Whether or not the holding of a hearing was required as a matter of law, the District Court, having determined upon a hearing,

was required to accord Appellant a fair hearing; compare Service v. Dulles, 354 U.S. 363 (1957). It did not do so. The failure to do so, apart from any issue of abuse or discretion in its substantive disposition, was a reversible procedural error.

A. The Trial Court's Prejudicial Disposition Of The Motion Establishes The Essential Lack Of Fairness In The Form of Hearing Held

1. The Trial Court Pre-Judged The Motion And Did So On The Basis Of Factors Without Rational Relationship To The Facts or The Issues Presented

a) Appellant had alleged, in his handwritten motion: "Due to extreme anxiety for his health and feeling he could not bear up to two (2) weeks of trial... the defendant's condition compelled him to enter a plea of guilty..."

Nine days prior to the date of hearing the trial judge expressed his disbelief of that allegation, preferring to believe, rather, that Appellant had entered his plea on the second day of trial because a "key witness put [the] finger" on Appellant (R. Defendant's Motion Filed July 10, 1964, p. 3). At the close of the hearing on July 24, 1964 (Tr. July 24, 1964, p. 30) he denied the motion relying on precisely the same conclusion that "it was at the time an important witness for the government put the finger on him... that he requested...that the matter be continued so that he could consider whether a plea would be taken in the case."

The Court's reliance on the precise conclusion in almost precisely the same words of his pre-hearing note flatly indicates that the hearing was an empty form designed to ratify the earlier conclusion.

In fact the statement was not true. No witness "put the finger" on Appellant at the time of his request for a recess (Trial Tr. 51-60). The trial Court's obvious inference was that because a witness supposedly "put the finger" on him, Appellant chose to plead guilty to one count, rather than stand trial on 17. But that statement was made in the context of Appellant's request for the opportunity to go to trial on all 17 counts, unquestionably aware that the only witness who might have previously done so would, again, "put the finger" on him. In that context, it was entirely irrational to rely upon Appellant's supposed unwillingness to face trial as a "basis" for thwarting his unequivocally indicated desire to do so. The obvious fact is, of course, that the trial Court, before hearing, without trial, and without jury, had independently and improperly determined Appellant's guilt, and relied on its own guilty "verdict" to deny the motion.

b) In pre-hearing marginal notes on the motion the trial Court had also stated, opposite Appellant's allegation that "a majority of the psychiatrists [at St. Elizabeth's] classified [Appellant] as: Anxiety Reaction - Obsessive - Compulsive": "See 5/6/64 Report St. Elizabeth Hosp. -

competent & not suffering mental disease or defect 9/17 - 10/17/63."

The trial Court clearly treated the May 6, 1964 letter stating the psychiatrists' conclusions respecting Appellant's competence,as of that time, to stand trial, and respecting his sanity at the time of his alleged crimes, as dispositive of Appellant's contentions respecting his "Anxiety Reaction" classification. In this respect, too, the Court below pre-judged the issues supposedly to be disposed of at hearing; and the pre-judgment was erroneous not only procedurally, but substantively as well.

Even if the psychiatrists' conclusions respecting competence and mental disease or defect had been able to withstand the judicial scrutiny they never received,[6/] the trial Court's assumption that those conclusions negated Appellant's allegations respecting his "Anxiety Reaction" status would be flatly erroneous. It is perfectly clear, as Appellant would seek to show on a fair hearing below, that a broad variety of so-called neuroses and psychoses may significantly affect the behavior of the individuals affliated with them, without rising to the status in legal terminology of "mental disease"

6/ Apparently one of the examining psychiatrists dissented from the conclusion reported to the Court, as customary, solely over the signature of the (Acting) Superintendent; but that fact does not appear of record.

or of "incompetence" to stand trial; that the "Anxiety-Reaction" classification of Appellant may well fall short of those legal characterizations, but is, nevertheless, a mental condition that would support Appellant's allegations that his "anxiety" rendered his plea, in practical effect, involuntary.[7/]

It is entirely clear that the trial Court had made its decision on the disposition of Appellant's motion well prior to hearing and had done so on the bases of flat misconceptions of the facts, and implied factual relationships, on which it relied. The hearing was a mere empty form which the trial Court utilized as a device to support ratification of its pre-judgment.

2. The Trial Court Erroneously Made Its Determination Without Any Evidentiary Basis For Its Disposition Of One Of The Ultimate Issues Raised By The Motion

Appellant's ultimate contention in his motion below was that physical illness at trial, and anticipated trial length had induced a mental state which had the effect of depriving his guilty plea of its voluntary nature. The evidence at the hearing unequivocally confirmed the claim of physical illness, and the medical extern's testimony (Tr. July 24, 1964, pp. 10, 11)

7/ Appellant also proposes to show, if this Court directs a fair hearing by the District Court, that asthma, from which Appellant suffers, is deemed by competent medical authorities to be symptomatic of anxiety neuroses. A hint of that conclusion is found in the testimony of the medical extern below (Tr. July 24, 1964, pp. 10, 11).

suggested the validity of the anxiety contention. There was no further evidence adduced by either party, however, with respect to Appellant's actual, or probable mental state at the time of plea.

The trial Court, in the circumstances of this case, had a duty either to obtain competent evidence on that issue, or to grant the motion. It had reason to know that Appellant had previously been committed for mental observation; that, although the terse and uninformative report from St. Elizabeth's had concluded that he was competent to stand trial and not suffering from a mental disease, there had been no judicial determination of those questions; and it should have known, in any event, that that stated conclusion did not contradict the allegation respecting the "anxiety reaction" classification asserted by Appellant's motion.

The issue of Appellant's mental state at the time of plea was the ultimate issue. There remained a judicially undetermined issue of his sanity. That ultimate issue presented was thus a clear and serious one.

The decisions leave no question of the need for a hearing where issues are raised respecting the moving defendant's mental state at the time of entry of his guilty plea; Gearheart, Poole, Dandridge, supra. If the hearing is to be a fair one, it must explore the ultimate issue raised, and failure to do so nullifies the validity of the hearing procedure.

It is true, of course, that Appellant was represented by appointed counsel below, who presumably could have adduced some evidence directly relating to the issue of Appellant's mental state, but did not do so. It is Appellant's position, however, that the fact of his representation by counsel is not controlling in these circumstances; compare Kadwell and Poole, supra.[8/] The issue of Appellant's mental state was plainly not a frivolous one. If his contentions were factually true they would have indicated, if not flatly established, that the guilty plea was not actually entered voluntarily, and that denial of the motion would deny him his constitutional right to jury trial and result in deprivation of Appellant's liberty in violation of the Fifth Amendment. These issues are sufficiently serious to require the District Court itself to undertake to assure, prior to a denial of the motion, the fullest possible exploration of the issues, particularly in the case of an indigent defendant. Dusky v. United States, 362 U.S. 402 (1960) indicates that even in post-conviction proceedings the existence of a substantial question as to a defendant's mental condition at the

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8/ The issue here need not be whether counsel was "effective" in the District Court. The record indicates that until the time of hearing, at least, the assistance rendered Appellant by counsel was "effective." It is impossible to determine whether, at the hearing on Appellant's motion below, his counsel simply made an apparently valid lawyer's judgment, without benefit of foresight, that his client's case was sufficiently appealling, on pre-sentence motion, as to make psychiatric testimony unnecessary.

time of pleading requires, at least, a full hearing on that issue; and see Sullivan v. United States, 205 F. Supp. 545 (S.D.N.Y., 1962); Goldstein & Fine, The Indigent Accused, the Psychiatrist and the Insanity Defense, 110 U. of Pa. Law Review. 1061 (1962); Winn v. United States, 106 App. D. C. 133, 270 F2d 326 (1959); Mitchell v. United States, 114 App. D.C. 353, 316 F2d 354 (1963). Appellant was denied that hearing in the District Court.

The trial Court's failure to explore the issue of Appellant's mental state at the time his guilty plea was entered requires at least reversal with directions to that Court to assure a plenary hearing on the issue.

IV. The Trial Court's Refusal To Permit Withdrawal Of Appellant's Guilty Plea, In The Face Of The Unequivocal Evidence Of His Physical Illness At The Time of Its Entry, Was A Reversible Abuse Of Discretion

Apart from the issue of the propriety of the hearing procedure, and the absence of evidence that would warrant denial of Appellant's motion, the record affirmatively shows that a grant of that motion was required in light of the limited evidence actually adduced.

The medical testimony at the hearing accorded in every material respect with the allegations of Appellant's motion concerning physical illness at the time of trial and plea. That testimony corroborated his contentions as to his asthmatic

condition and his statements respecting the inflamed condition of his arm.[9/] There was testimony that his temperature on the night following his first day of trial was over 100°F (Tr. July 24, 1964, p. 6).

The facts adduced indicate, as a fit subject for judicial notice, that no person under those conditions, regardless of the presence or absence of anxiety neuroses otherwise, may be expected to have the mental acuity, and ability, that he might otherwise possess, to deal coherently with difficult decisions and prolonged strain. The evidence of physical illness alone thus show a "fair" and "just" reason to permit withdrawal of the guilty plea and raises a serious question respecting the truly voluntary character of the plea. The refusal to permit withdrawal of the plea by Appellant, and the resulting denial of the opportunity to go to trial on the full range of charges against him in these circumstances represents a clear abuse of the trial Court's discretion. "Fairness" and "justice," which are the touchstones for decision of pre-sentence motions under Rule 32(d), are certainly not served or advanced by insistence that an ill man's guilty plea must stand; by denial of the opportunity, and perhaps the right, to trial of all of the issues by a jury.

9/ There was similar testimony relating to anxiety reactions (cf. footnote 7, supra) to his asthmatic condition.

Any doubts as to the side on which justice lies should be eliminated by recognition of the fact that the Court is not faced here with a choice between sustaining the questionable procedure of the lower Court or freeing the accused. The sole result of reversal here would be to offer him the opportunity to submit himself to jury trial on the full 17-count indictment.

CONCLUSION

For all of the foregoing reasons and arguments, the Order of the District Court denying Appellant's motion under Rule 32(d) must be reversed with directions to vacate the Judgment and Commitment of July 24, 1964, and to grant leave to withdraw the guilty plea to count I of the indictment or, in the alternative, a direction to grant leave to withdraw the plea, to direct a plenary hearing assuring full exploration of the issue of Appellant's mental state at the time of entry of that plea.

Respectfully submitted,

LESTER M. BRIDGEMAN

Attorney for Appellant
Appointed by This Court

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,950

PHILLIP L. PELLETIER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
MARTIN R. HOFFMANN,
Assistant United States Attorneys.

Cr. No. 434-64

QUESTIONS PRESENTED

Should appellant have been allowed leave to withdraw his guilty plea prior to sentencing, when he entered the plea after the second day of trial to a single count of a seventeen-count indictment, where the record shows voluntary and understanding tender of the plea, and where appellant failed to establish facts to support his allegations that the plea was entered because of duress from physical illness?

INDEX

TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,950

PHILLIP L. PELLETIER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant went to trial on June 24, 1964 facing a seventeen-count indictment which charged one count interstate transportation of a stolen motor vehicle (18 U.S.C. 2312); one count interstate transportation of a forged security (18 U.S.C. 2314); two counts false pretenses (22 D.C.C. 1301); six counts of forging and six of uttering (22 D.C.C. 1401); and one count described a conspiracy to commit offenses—some identical and some similar—to those charged in the other counts (78 U.S.C. 371). On the second day of trial, after the testimony of

the second government witness[1] (both witnesses had been brought from Indiana) appellant sought respite in the proceedings to confer with his attorney and the prosecutor (Tr. 58). Thereafter, he pretermitted further trial by announcement he would enter a plea of guilty to the conspiracy count of the indictment (Tr. 59).

The trial court's acceptance of the plea on June 25, 1964 was preceded by inquiry which elicited from appellant that he understood his right to continue his jury trial; that he was satisfied with the services of his lawyer; that he was aware of the consequences of the contemplated plea of guilty; that he had in fact committed the crime charged; and that he intended to plead guilty because he was guilty and for no other reason (Plea Tr. 2-5).

On July 10, 1964, appellant filed a motion *pro se* seeking leave to withdraw his plea. Therein he alleged that his plea

> "was entered under compulsion and threat that permanent injury could result from a lengthy trial, and the acute anxiety and compulsion existing in his mind at the time" (Motion 3).

His motion alleged facts, some of which were annotated by the trial judge prior to hearing. Appellant alleged

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[1] On the first day the first witness—an auto salesman—had identified appellant who had represented himself as construction company executive Walter H. Edwards, Jr. Appellant had given a company check for and made off with the car, the subject of the conspiracy and transportation counts of the indictment (Tr. 21-23). On the second day the second witness—a bank messenger—had identified appellant's co-conspirator as the Edwards Company employee to whom this check when cancelled had been returned (Tr. 51-58). As the prosecutor's opening statement indicated, the check and other cancelled checks of that period, together with other blank Edwards checks disappeared immediately thereafter and concurrently with the disappearance of the co-conspirator. That the checks and co-conspirator turned up later in Washington with appellant—where more phoney Edwards paper was negotiated—was the thrust of the government's case (Tr. 6-18). Thus, it was upon establishment of the identifications critical to the conspiracy underlying the whole case that the plea occurred (Tr. 58-60).

that the majority opinion derived from a mental examination at St. Elizabeths classified him as "Anxiety Reaction—Obsessive-Compulsive" (the trial judge noted in the margin of the motion that the letter from the hospital did not so indicate);[2] that for several days prior to trial he had been "suffering from severe headache, difficulty in breathing, persistent cough, and lightheadedness"; that attempts to secure medical examination had resulted only in examination and treatment by a fourth year medical student-extern; that he feared he could not bear up under the forecast two-week trial (the trial judge noted that court and counsel thought announcement should be made to the jurors since it was summer and vacation time); and that a desire had been expressed by the trial judge for a disposition in the case (as to which the judge noted "not so . . . see transcript," adding his recollection that appellant had been identified by a key witness just prior to his plea. See N.1, this brief, *supra*). A combination of these pressures had produced the plea, the statement continued, the gravity of which was only realized when the probation officer after interview indicated he would recommend a maximum sentence. Appellant added that he was not guilty.

A hearing was convened on the motion on July 24, 1964. Appellant produced two medical witnesses from the District of Columbia Jail. Testimony by the student-extern as to appellant's physical condition the night before the plea showed that appellant had sought medical help for a cold condition; he had a temperature of 100 degrees with slight infection—"some indication of inflammation"—of the throat; he had an asthmatic condition classified as "acute" (by reason of its sudden onset, not its severity) which produced a wheezing while breathing (that was audible only through a stethoscope); he

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[2] The letter is a part of the record of case No. 1228-63, which was precedent to the instant case; appellant was reindicted (the other indictment was dismissed) and his case was renumbered as No. 434-64 in which judgment was entered, and from which this appeal proceeds.

was given a medication only for a temporary condition; no further medical examination was deemed necessary; the medication then administered appellant, it was adduced, would have no effect on appellant's mental condition (Hearing Tr. 5-17). The proof as to appellant's condition one day prior to the plea showed appellant had in fact seen the doctor at District of Columbia Jail. He had complained of a cold and a cough; the doctor prescribed for this condition Vicks Vapo-Rub, aspirin and Coryza tablets and—for the cough—Brown's mixture. None of these prescriptions would effect appellant's medical functioning, it was declared (Hearing Tr. 21-23-A).

Appellant himself testified that on the day of the plea he was having difficulty breathing and he felt extremely hot. Additionally, he disclosed that in court he was having constant difficulty controlling his cough: he kept coughing and could not help himself. He mentioned a swollen, red forearm from the shots of the night before; the night after the plea, however, he had been told at the District of Columbia Jail not to worry about that condition. Appellant at one point started to refer to St. Elizabeths in a reply to an inquiry by the court into the asserted coughing in the courtroom. The judge interrupted when it was clear the answer was not responsive, and no effort was made by the defense to put any matter pertaining to St. Elizabeths before the court (Hearing Tr. 23A-28). Appellant concluded direct examination with his reason for entering the plea:

> "Well, as I stated in the motion, the announcement was made to the court that the trial could take at least two weeks and I wasn't feeling well and I wanted to get over with it and so I wanted to go to bed." (Hearing Tr. 28)

On cross-examination appellant admitted to two previous forgery convictions. He admitted he had said not a word to the trial judge at the time of his plea about his condition. He undertook to state he had told his attorney of his trouble. When pressed by the prosecutor,

however, he reversed himself, admitting he never mentioned it to the lawyer (Hearing Tr. 28-29).

Defense counsel argued for grant of the motion:

> "it is clear from record that the defendant was under the effect of drugs at the time he pleaded guilty in open court and at the time he had an asthmatic condition and I would leave it to Your Honor to decide it from the record." (Hearing Tr. 29)

The trial judge agreed with government counsel that appellant had made no showing of debilitating illness. Ruling that there was nothing in the testimony to indicate appellant was other than capable at the time of his plea, the Judge recalled his observations of appellant at entry of the plea that appellant had suffered no cough nor difficulty in breathing in court that day, but rather that he had "readily and clearly responded" to all questions, freely owning that he entered the plea of guilty for the reason that he was guilty and for no other reason. He observed further that it was only after appellant had been identified in the course of trial that opportunity to plead had been sought (Hearing Tr. 30-31).

STATUTES AND RULE INVOLVED

Title 18, United States Code, § 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * *

Title 18, United States Code, § 2312 provides:

> Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than

$5,000 or imprisoned not more than five years, or both.

Title 18, United States Code, § 2314 provides in pertinent part:

* * * *

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or
>
> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

* * * *

Title 22, District of Columbia Code, § 1301 provides in pertinent part:

> Whoever, by any false pretense, with intent to defraud, obtains from any person anything of value, or procures the execution and delivery of any instrument of writing or conveyance of real or personal property, or the signature of any person, as maker, indorses, or guarantor, to or upon any bond, bill, receipt, promissory note, draft, or check, or any other evidence of indebtedness, and whoever fraudulently sells, barters, or disposes of any bond, bill, receipt, promissory note, draft, or check, or other evidence of indebtedness, for value, knowing the same to be worthless, or knowing the signature of the maker, indorses, or guarantor thereof to have been obtained by any false pretense, shall, if the value of the property or the sum or value of the money or property so obtained, procured, sold, bartered, or disposed of is $100 or upward, be imprisoned not less than one year nor more than three years; . . . .

Title 22, District of Columbia Code, § 1401 provides:

> Whoever, with intent to defraud or injure another, falsely makes or alters any writing of a public or private nature, which might operate to the prejudice of another, or passes, utters, or publishes, or attempts to pass, utter, or publish as true and genuine, any paper so falsely made or altered, knowing the same to be false or forged, with the intent to defraud or prejudice the right of another, shall be imprisoned for not less than one year nor more than ten years.

Rule 32, Federal Rules of Criminal Procedure, provides in pertinent part:

* * * *

> (d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

* * * *

SUMMARY OF ARGUMENT

There is nothing in the record of the entry of appellant's plea to suggest it was not his voluntary, willing choice to own his guilt by judicial confession rather than abiding the jury trial upon which he had already embarked.

Appellant's contentions that the hearing on his motion for leave to withdraw the plea was inadequate and unfair are not supported in the record. They cannot be substituted for his own inability to produce evidence to support his contentions he was ill, anxious and therefore coerced into entry of the plea. The judge's own observations, and resolve of the issue which depended on appellant's credibility are not open to review on this appeal. The record simply does not support appellant's assertion that denial was discretion abused.

ARGUMENT

Appellant had a fair and complete hearing on his motion to withdraw his plea, and no abuse of discretion can be shown from its denial.

(See Tr. 6-18, 21-23, 51; Plea Tr. 2-5; Hearing Tr. 5-17, 21-31)

Appellant's position is bottomed on his view of the law that if "any evidence" established a "reasonable possibility" that illness rendered his plea involuntary, it was abuse of discretion for the trial judge to deny withdrawal of his plea of guilty (Br. 16). He urges that he made sufficient showing again to put the government to proof of guilt. Reciting that the record fails affirmatively to show that his trial counsel made "an apparently valid lawyer's judgment" not to produce psychiatric testimony in his behalf (Br. 24, and fn. 8), he asserts he had no fair hearing because the judge did not *sua sponte* call additional witnesses. There is no factual or legal substance in either contention.

a. *Adequacy of the hearing*

Appellant's complaints faulting the integrity of the hearing are of no consequence. His assertion that the Judge prejudged the matter prior to hearing springs from a series of notes on the margin of the *pro se* handwritten motion. These notes (contrary to appellant's hopes for them) do no more than reflect disagreement in the record with the facts he alleged. No indication of predisposition as to the legal consequences of these facts or the ultimate disposition of the motion can be derived therefrom. They indicate no more than pains taken by the Judge to review the record of the case prior to hearing. Moreover, none of the facts so annotated became critical at the hearing: neither proof nor argument refer to them.

The answer to the assertedly fatal void of psychiatric testimony at the hearing is simple and conclusive. Had

appellant or his counsel wished to augment the medical testimony to establish the predisposition he now claims to "anxiety" which—together with his illness—temporarily deprived him of free choice[3] (Br. 21-22), he could as easily have called the psychiatrists as he called the doctor and the extern. In view of the earlier letter reporting him free of disease or defect, in total absence of any motion for continuance or competency hearing, and given the judge's opportunity to observe appellant at the trial, there was no call upon the judge to investigate defense counsel's assessment of the merits of the psychiatric evidence available.

To appellant's tangential complaint he originally had received no competency hearing (Br. 21), the same answer may be returned. He never sought to make appellant's competency to stand the original trial an "ultimate issue" even in the face of award of an opportunity to do so. Since psychiatric examinations were complete and contemporaneous with crime and trial, the matter could as well have been aired after the plea as before in the hearing granted. See *Hunter* v. *United States*, 116 U.S. App. D.C. 323, 323 F.2d 625 (1963); *Krupnick* v. *United States*, 264 F.2d 213 (8th Cir. 1959); *Gunther* v. *United States*, 94 U.S. App. D.C. 243, 215 F.2d 493 (1954). Of course, a judicial ruling of competency is clear from the court's actions. See *Cooper* v. *United States*, —— U.S. App. D.C. ——, 337 F.2d 538, 539-540 (1964), (concurrence); *Coffman* v. *United States*, 290 F.2d 212 (10th Cir. 1961); cf. *Ashton* v. *United States*, 116 U.S. App. D.C. 367, 324 F.2d 399 (1963).

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[3] Appellant seeks to lend weight to an impossible position by some remarkable forensic bootstrapping: to the unproven (and manifestly discredited) bare allegation in appellant's motion to withdraw the plea that he was classified "anxiety reaction-obsessive-compulsive" is coupled a gratuituous extra-record suggestion that there is a minority view at St. Elizabeths favorable to appellant (Br. 21, fn. 8). This latter has no place in this appeal. Rule 12a of the Rules of this Court; F.R. Crim. P. 39b; F.R. Civ. P. 75. See *Edwards* v. *United States*, 312 U.S. 473, 482 (1941).

In short, appellant seeks no more than the right to litigate his cause in piecemeal fashion, trying first one approach, and when that fails, insisting an other chance to try something else. The law gives him no such right, and none should be created for him. F. R. Crim. P. 12.

b. *Ruling on the motion*

This Court has styled a plea of guilty in a criminal case "the highest form of voluntary choice known to the law—confession in open court." *Watts* v. *United States*, 107 U.S. App. D.C. 367, 278 F.2d 247 (1960). The validity of such a plea, accepted after a thorough judicial evaluation of the volunteering defendant's sincerity under F. R. Crim. P. 11, does not depend on the later pleasure or whim of the convict. *Gundlach* v. *United States*, 262 F.2d 72 (4th Cir. 1958); see *United States* v. *Colonna*, 142 F.2d 210, 211 (3rd Cir. 1944). Withdrawal of such a plea prior to sentencing "is not an absolute right but a decision within the sound discretion of the trial court which will be reversed by an appellate court only for an abuse of that discretion." *Everett* v. *United States*, —— U.S. App. D.C. ——, 336 F.2d 979, 983 (1964) and cases cited at fn. 16. *Gearhart* v. *United States*, 106 U.S. App. D.C. 270, 273, 272 F.2d 499, 502 (1959) blueprints the exercise of that discretion:

> [A trial court's] discretion must be exercised on the basis of sound information, soundly viewed. Where the accused seeks to withdraw his plea of guilty before sentencing, on the ground that he has a defense to the charge, the District Court should not attempt to decide the merits of the proffered defense, thus determining the guilt or innocence of the defendant. In certain situations, where the issue raised by the motion to withdraw is one of tangential nature, resolvable apart from the merits of the case, the District Court may appropriately hold a factual hearing to determine whether the accused has a "fair and just" reason for asking to withdraw his plea of guilty.

The burden is on the movant to produce this "sound information" on which resolution of the motion proceeds. *Everett* v. *United States*, *supra*; *United States* v. *Smiley*, 322 F.2d 248 (2d Cir. 1963); *United States* v. *Lester*, 247 F.2d 496, 501 (2d Cir. 1957).

Appellant's motion advanced but one reason for withdrawal: his plea was not voluntary—physical illness imposing fear of permanent injury to his health from a long trial had compelled his judicial confession. Quite obviously, this was not a defense to the charge, but an issue "tangential in nature": the matter was appropriate for "factual hearing" in the contemplation of *Gearhart* v. *United States*, *supra*. Appellant's success depended on first establishing the fact of the physical illness and then showing that the illness had the coercive effect claimed.

As the transcript of the hearing shows, the judge resolved both these factual issues against appellant: far from "fair and just reason," *Kercheval* v. *United States*, 274 U.S. 220 (1927), there was no reason at all. By no stretch can abused discretion be demonstrated, for there was abundant basis for the court's ruling: the medical testimony showed appellant at best suffered no more than a bad cold (Hearing Tr. 6-7, 9-10, 15-16, 22-23); there was testimony that no drugs administered prior to the plea could have affected his mental processes (this was the ground relied upon at hearing) (Hearing Tr. 11-12, 16-17, 23); appellant himself never even told his attorney he was ill at trial (Hearing Tr. 29); no continuance had been sought, or even recess of the proceedings; appellant was not coughing or having difficulty breathing at the time of his plea as he claimed[4] (Hearing Tr. 26, 30).

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[4] It must not be discounted that the trial judge had had more than ample time to assess appellant's demeanor and credibility, a resolution which is not open to appellate review. See authorities collected in *Farrar* v. *United States*, 107 U.S. App. D.C. 204, 209-211, 275 F.2d 868, 873-878 (1959) (dissent). During the aborted trial, the impact on appellant of the critical identification testimony had been noted (n. 1, this brief, *supra*). Appellant had tested the

To the extent appellant seeks to relitigate these facts (Br. 14), his appeal is frivolous. *United States* v. *Johnson*, 327 U.S. 106, 113 (1946). To the extent the claim is that the trial judge could not reject his claims (Br. 14, 16) the appeal is incredible. See *United States* v. *Hughes*, 325 F.2d 789 (2d Cir. 1964) (no abuse of discretion in denying leave to withdraw guilty plea despite assertions of innocence throughout six-day hearing); *United States* v. *Nigro*, 262 F.2d 783 (3d Cir. 1959) (assertions of inadvertence, innocence and that plea of guilty was entered by counsel over "vement objections" of defendant allowably rejected by trial judge after extensive hearing). Compare *Gearhart* v. *United States*, *supra* (abuse of discretion to withhold leave to withdraw plea where defendant produced a documented defense of insanity); *United States* v. *Lester*, *supra* (unrepresented defendant who established his reasonable belief he was pleading to a misdemeanor should have been forgiven his plea to a felony); *Poole* v. *United States*, 102 U.S. App. D.C. 71, 75, 250 F.2d 396, 400 (1957) (uncounseled defendant entered plea at arraignment). Even had appellant established all of his hearing claims, they establish no more than passing discomfort, and his preference to go to bed rather than to trial (Hearing Tr. 28).

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prosecution's willingness to bring several key witnesses from Indiana and found it not wanting. No stranger to the courts (with two prior convictions), his bargaining position with the bulk of a long technical trial facing the prosecution would be infinitedly better. In view of the misrepresentations in the motion, the flaccid statement therein of innocence (his statement at hearing was that he wished to get over with it), and appellant's revealing disclosure in his motion that he only sought to withdraw the plea when he learned the probation officer would recommend the maximum sentence, fairness and justice not only allowed but compelled denial of the motion. See *Everett* v. *United States*, *supra*, 336 F.2d at 984.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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